

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

ROBERT S. MATHES, COMMISSIONER)
OF THE DEPARTMENT OF PLANNING)
AND NATURAL RESOURCES, IN HIS)
CAPACITY AS TRUSTEE FOR)
NATURAL RESOURCES OF THE)
TERRITORY OF THE UNITED STATES)
VIRGIN ISLANDS AND IN HIS)
CAPACITY AS ASSIGNEE OF THE)
CLAIMS OF L'HENRI, INC.,)

Plaintiff,)

vs.)

VULCAN MATERIALS COMPANY;)
THE DOW CHEMICAL COMPANY,)

Defendants.)

CIVIL NO. 2006/229 GB

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

RESPONSE OF THE PLAINTIFF TO ORDER OF THE COURT DATED JULY 7, 2009

In an Order dated July 7, 2009 (Docket Entry #26), the Court requested the parties answer three questions. The questions appear below along with the Plaintiff's responses.

REQUEST 1: In light of the recent decision of the Supreme Court of the United States in Burlington Northern and Santa Fe Ry. Co. v. United States, --- U.S. ---, 129 S. Ct. 1870, 1874 (2009), do the defendants qualify as "arrangers" within the meaning of 42 U.S.C. § 9607(a)(3)?

PLAINTIFF'S RESPONSE: Based upon the information currently in Plaintiff's possession, Plaintiff does not believe the Defendants qualify as "arrangers" within the meaning of 42 U.S.C. § 9607(a)(3) in light of the Supreme Court's decision in Burlington Northern.

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REQUEST 2: Did the defendants enter into the sale of chemicals to L’Henri, Inc. (“L’Henri”) with the intention that at least a portion of the product be disposed of during the transfer process by one or more of the methods described in 42 U.S.C. § 6903(3)?

PLAINTIFF’S RESPONSE: Based upon the information currently in Plaintiff’s possession, Plaintiff does not have information to support a finding that the Defendants entered into the sale of chemicals to L’Henri with the intention that at least a portion of the product be disposed during the transfer process by one or more of the methods described in 42 U.S.C. § 6903(3).

Based upon information and belief at the time of filing, Plaintiff does allege that both Defendants were a “manufacturer and supplier of PCE used at O’Henry Dry Cleaners” and both Defendants “failed to adequately warn PCE users of the dangers posed by the use and disposal of PCE.” Complaint at Paragraphs 24, 25, 27 and 28.

REQUEST 3: Do the defendants fall within any of the other categories of “covered persons” set forth in 42 U.S.C. § 9607 (a) (“Section 9607(a)”)?

PLAINTIFF’S RESPONSE: It is Plaintiff’s position that the defendants do not fall within any of the other categories of “covered persons” set forth in 42 U.S.C. § 9607(a).

Conclusion

Having responded to the Court’s three questions, the Plaintiff respectfully restates its position that the Court lacks subject matter jurisdiction and, as such, must dismiss this action without prejudice. See Suggestion to Dismiss Without Prejudice Pursuant to Fed.R.Civ.P.12(h)(3) (Docket Entry #14).

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Respectfully submitted,

LAW OFFICES OF JOHN K. DEMA, P.C.

/s/ John K. Dema

Dated: July 24, 2009

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of July, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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And I hereby certify that I have mailed the document by U.S. Mail and by electronic mail to the following non-filer users:

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